

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 15, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP747-CR**

**Cir. Ct. No. 2012CF81**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARY A. FROUST,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Fond du Lac County: ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Mary Froust appeals from a judgment of conviction for first-degree reckless injury for stabbing an acquaintance who sexually assaulted her. Froust pled not guilty and not guilty by reason of mental

disease or defect to first-degree attempted intentional homicide and was convicted by a jury of first-degree reckless injury at the guilt phase of the proceedings.<sup>1</sup> At the responsibility phase of the bifurcated trial, the trial court directed a verdict in favor of the State after Froust presented her case-in-chief, finding that Froust did not make a prima facie showing that she lacked substantial capacity either to appreciate the wrongfulness of her conduct or to conform her conduct to the requirements of the law. Froust appeals the trial court's directed verdict. We affirm.

¶2 When a criminal defendant enters pleas of not guilty and not guilty by reason of mental disease/defect, WIS. STAT. § 971.165 requires a bifurcated trial. The first phase of the trial determines guilt and is the same as a regular criminal trial where the burden of proof is upon the State. *See* § 971.165(1). The second phase concerns whether the defendant is to be relieved of responsibility for the criminal conduct. *See* WIS. STAT. §§ 971.15, 971.165. A person is not responsible for criminal conduct if as a result of mental disease or defect, he or she lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law at the time of the criminal conduct. Sec. 971.15(1).

¶3 The defendant bears the burden of proof of establishing a mental disease/defect defense “to a reasonable certainty by the greater weight of the credible evidence,” WIS. STAT. § 971.15(3), and may not have that issue presented

---

<sup>1</sup> The information was amended pursuant to WIS. STAT. § 971.29(2) (2011-12) to add the charge of first-degree reckless injury after the close of evidence at the guilt phase of the proceedings. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to a jury without making a prima facie case, *State v. Kazee*, 192 Wis. 2d 213, 223, 531 N.W.2d 332 (Ct. App. 1995). A directed verdict against a defendant is proper if “there is no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or defect by a preponderance of the evidence after giving the evidence the most favorable interpretation in favor of the accused asserting the defense.” *State v. Leach*, 124 Wis. 2d 648, 663, 370 N.W.2d 240 (1985). While a favorable expert opinion is not an indispensable prerequisite, a defendant must present some evidence that would “enable[] the jury to make the affirmative determination” that an expert could not make. *Id.* at 666. A jury may not be left to speculate, form conjectures, or theorize as to an ultimate fact based on a “mere possibility.” *Id.* at 664 (citation omitted). On appeal from a decision to grant a motion for directed verdict, the standard of review “is whether the trial court was clearly wrong.” *Id.* at 665 (quoting *Greiten v. La Dow*, 70 Wis. 2d 589, 598, 235 N.W.2d 677 (1975)).

¶4 The issue on appeal is whether Froust is entitled to a jury determination as to whether post-traumatic stress disorder (PTSD) resulted in her lacking substantial capacity either to appreciate the wrongfulness of her conduct or conform her conduct to the requirements of the law at the time of her offense. *See* WIS. STAT. § 971.15(1). This is a critical inquiry in the responsibility phase. *See State v. Duychak*, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). We find that the trial court was not clearly wrong in directing a verdict against Froust as Froust did not provide sufficient evidence for a jury to determine, without speculating, forming conjectures, or theorizing, that at the time of her criminal conduct she lacked substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the law.

¶5 The only evidence that Froust presented to show that at the time of the stabbing she was unable to appreciate the wrongfulness of her conduct or to conform her conduct to the law was her own testimony that she essentially blacked out and was thinking of another man who had repeatedly sexually assaulted her. From this and from the testimony of a sexual abuse counselor who testified about the general effects of sexual abuse on victims, Froust argues that a jury could infer that she was experiencing “disassociation” and lacked the ability to control herself or appreciate the wrongfulness of her conduct.

¶6 Another expert witness called by Froust, a court-appointed psychologist who examined Froust, did not support her testimony. Froust’s expert testified that Froust’s extreme intoxication at the time of the offense, instead of her PTSD, provided another explanation for her actions, and that she therefore did not meet the legal standard excusing her from responsibility. Although Froust is not required to provide expert testimony to escape a directed verdict, *Leach*, 124 Wis. 2d at 666, the evidence that she presented established only the “mere possibility” that she experienced disassociation at the time of her criminal conduct and, therefore, would have required the jury to speculate or reach by conjecture that she lacked substantial capacity to appreciate the wrongfulness of her conduct or to conform her conduct to the law. Under these circumstances, the trial court was not clearly wrong to direct a verdict in favor of the State. *Id.* at 664-65.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

